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No. 89-1400

In The

Supreme Court of the United States

October Term, 1989

CITY OF LONGMONT, COLORADO,

Petitioner,

v.

JAMES OAKLEY,

Respondent.

RESPONDENT JAMES OAKLEY'S BRIEF IN OPPOSITION TO "PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT"

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OPINIONS BELOW; SUPREME COURT JURISDICTION; STATUTES AND REGULATIONS INVOLVED

Respondent submits that these matters are correctly set forth in the City of Longmont's Petition.

STATEMENT OF FACTS

The Statement of facts, as set forth at pp. 3-6, inclusive, of the City of Longmont's Petition, is erroneous. The correct facts are as set forth by the Tenth Circuit Court of Appeals at pp. 1129-1130 of its Opinion (Oakley v. City of Longmont, 890 F.2d 1128 (10th Cir 1989), pp. 44a-49a of the Appendix to the Petition). These facts, as stated by the court, are:

"Mr. Oakley was employed by the City as a fire fighter when he was involved in an automobile collision with a drunk driver and suffered a permanent head injury. As a City employee, Mr. Oakley was covered by the City of Longmont Medical and Dental Care Expense Reimbursement Plan, Plan No. 56690 (the Plan), which extended coverage until his termination on August 27, 1988, and for an additional ninety days until November 26,

1988, as provided by the Plan. In July 1988, after an exchange of letters, the City informed Mr. Oakley that he was not eligible to maintain his medical insurance for an additional eighteen months with the City's Plan because he is a dependent under his wife's group health plan. Nevertheless, on October 7, 1988, the Plan notified Mr. Oakley of his option to continue his prior medical coverage for eighteen months by maintaining the premium payments himself. Apparently, Mr. Oakley did not return the election at that time because of his prior notification from the City that he was ineligible for continuation coverage. Subsequently, Mr. Oakley submitted the form on November 21, 1988.[1]

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[1] In its opinion, the district court stated, "Because plaintiff has not yet elected continuation coverage, and because he is a dependent under his wife's policy, the City has not extended the plaintiff continuation coverage." Oakley v. City of

At the time of his termination, Mr. Oakley was a patient at the Bear Creek Rehabilitation Center where he was receiving rehabilitation therapy for the brain injury he had suffered. Although he was listed as a dependent on his wife's group health plan, Mrs. Oakley's coverage does not reimburse the costs of this treatment. Consequently, Mr. Oakley sought declaratory and injunctive relief to continue his medical coverage with the City. The district court, however, denied relief under 42 U.S.C. § 300bb-2(2)(D)(i), which states that continuation coverage ends on the date "the qualified beneficiary first becomes, after the date of the election -- (i) covered under any

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(footnote cont'd)

Longmont, 701 F.Supp 800, 801 (D.Colo. 1988). The record, however, establishes that Mr. Oakley timely returned the election form. The City does not contest his eligibility on this basis.

other group health plan (as an employee or otherwise) ...." The court cited accompanying legislative history which it believed manifested Congress' "beneficent purpose of requiring a minimal amount of continuation coverage for a limited time to provide qualified beneficiaries an opportunity to secure other health benefits." 701 F.Supp. at 801-02. However, relying principally on language in proposed regulations promulgated in the Federal Register by the Internal Revenue Service[2], which was delegated the authority to issue regulations defining required coverage, the district court concluded that Congress did not intend "to require employers to provide continuation coverage to qualified beneficiaries who are covered by more than

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[2] Footnote 2 omitted; see p. 48a of Petitioner's Appendix

one group health plan." Id. at 802. Mr. Oakley now appeals this conclusion, contending the court erred in construing the statute and in relying on a proposed Treasury Regulation that has not yet been adopted.[3]"

REASONS FOR DENYING REVIEW

1. Neither issue presented by Petitioner is important enough to warrant this Court exercising its discretion and granting review.

2. Neither issue presents an "... important question of federal law which has not been, but should be, settled by this Court ...." (U.S.C.S. Rules of Court, Supreme Court Rule 17(c)).

3. As a case of "first impression", there are no conflicts among the various

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[3] Footnote 3 omitted; see p. 49a of Petitioner's Appendix

state or federal courts of appeals to be resolved.

4. As a case of "first impression", the issues are premature. As noted by Justice Frankfurter: "Wise adjudication has its own time for ripening." (Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-918, 70 S.Ct. 252 (1950). The time for these issues is not "ripe." The Court needs the benefit of actual experience by potentially affected individuals; the benefit of underwriting studies and analyses on the effect (if any) of the Tenth Circuit's decision; and the benefit of some history of how this case will be applied (if at all) by the lower courts, before addressing the issues presented by Petitioner.

5. The Tenth Circuit Court of Appeals' refusal to follow a proposed

Treasury regulation is consistent with prior decisions of this Court.

6. Petitioner is merely seeking recourse regarding its own individual interests by recovering payments made on Respondent's behalf, not otherwise paid by Safeco Insurance Company. (Note: Safeco Insurance Company has agreed to be bound by the court's decision. (890 F.2d 1128, 1130).

7. As regards the public interest in this case, Petitioner has provided the Court with nothing beyond pure speculation as to how this case could have any impact on any entity other than itself.

8. The Tenth Circuit Court of Appeals correctly decided the issue of Respondent's entitlement to Continuation Health Benefits.

I. PETITIONER'S ISSUE "B"

A. Lack of Importance

The Tenth Circuit Court of Appeals' lack of persuasion by the proposed Treasury regulation (Federal Register, Vol. 52, No. 114, June 15, 1987, pp. 22716, et seq.) is not " ... an important question of federal law which has not been, but should be, settled by this Court, ..."

Following its analysis of the purpose of 42 U.S.C. § 300bb-1, et seq., and its application to the facts of this case, the Tenth Circuit addressed Petitioner's argument on the applicability of the proposed Treasury regulations, by stating that:

> "The proposed treasury regulations on continuation coverage requirements of group health plans, on which the district court relied, do not alter our reading. Until the agency completes formal rule making and promulgates final regulations, the proposed rules, which the Internal Revenue Service

> has already deemed interpretive regulations, are unpersuasive. See Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1036, n. 10 (4th Cir. 1980)."

Oakley v. City of Longmont, 890 F.2d 1128, 1133 (10th Cir. 1989).

In the Telvest case, the Fourth Circuit likewise had no difficulty in determining that:

> "We, however, have not considered the effect of these proposed regulations upon this case because the regulations are not now in effect and we do not know when, if ever, they will become effective. If they do become effective while this case is being considered in the district court, that court will doubtless take them into account." Telvest, Inc. v. Bradshaw, supra at p. 1036, n. 10.

It should be noted that the Fourth Circuit and the Tenth Circuit are consistent in their treatment of the weight to be accorded to proposed regulations.

A thorough review of the history of this Court's decisions, regarding the weight

to be accorded to administrative interpretations and regulations, reveals distinctive patterns with regard to the effect of existing regulations and Agency practice, but reveals no weight ever being accorded to proposed administrative regulations.

Consequently, Respondent submits that the disinclination of the Tenth Circuit to be bound by interpretations contained in a proposed Treasury regulation is not a special and important reason for granting a review on writ of certiorari, nor does same involve an important question of federal law which has not been, but should be settled by this Court.

B. The Tenth Circuit Court of Appeals Correctly Decided Not to Apply the Proposed Treasury Regulations to this Case.

Although not stated by the Tenth Circuit in its opinion (890 F.2d 1128), there are reasons in addition to the holding in Telvest, supra, for not applying the proposed Treasury regulations to this case.

1. Public Health Service Notice

On January 7, 1987, Vol. 52, No. 4, p. 604 of the Federal Register, the Public Health Service published a Notice entitled "Requirements for Certain Group Health Plans for Certain State and Local Government Employees -- Continuation Coverage."

The Notice advises that:

> "... pending promulgation of regulations, the interim guidanace of this notice becomes necessary." At p. 604.

In the exercise of its guidance, the Public Health Service advised that:

> "The Department of Labor has prepared a model notice for the corresponding notification requirements under the ERISA amendments. We have adapted this notice for purposes of Title XXII. The department will consider that the use of the model notice appended to this notice will demonstrate good faith compliance with a reasonable interpretation of the general notice requirements entitled 10 of COBRA and § 2206 of the PHS Act in the absence of regulations in this area." Page 605.

The appendix referred to immediately above, in its model statement to the employee, regarding continuation coverage, states:

> "If you choose continuation coverage [name of employer] is required to give you coverage which, as of the time coverage is being provided, is identical to the coverage provided under the plan to similarly situated employees or family members. The new law requires that you be afforded the opportunity to maintain continuation coverage for three years unless you lost group

> health coverage because of a termination of employment or reduction in hours. In that case, the required continuation coverage period is 18 months. However, the new law also provides that your continuation coverage may be cut short for any of the following five reasons:
>
> (1) [Name of employer] no longer provides group health coverage to any of its employees;
>
> (2) The premium for your continuation coverage is not paid;
>
> (3) You became an employee covered under another group health plan;
>
> (4) You became entitled to Medicare benefits; and
>
> (5) You were previously married to a covered employee and subsequently remarried and are covered under your new spouses group health plan." Page 606.

Thus, the position of the PHS is consistent with Respondent's argument that a terminating event (42 U.S.C. § 300bb-2 (2)(D)(i)) has not occurred, and that Respondent is entitled to "identical

coverage," or at least coverage which is meaningful in the sense that the employee has continuation coverage for reasonably necessary ongoing treatment.

2. Prior United States Supreme Court Decisions

This Court's prior decisions on the weight to be accorded administrative regulations also support the Tenth Circuit's position regarding the proposed Treasury regulations.

Pertinent cases in which the Court has considered this issue, include United States of America v. American Trucking Associations, Inc., 310 U.S. 534, 84 L.Ed. 1345 (1940); Black v. Magnolia Liquor Company, 355 U.S. 24, 78 S.Ct. 106, 2 L.Ed.2d 5, (1957); Federal Trade Commission v. Mandel Brothers, Inc., 359 U.S. 385, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); E.I. DuPont

de Nemours and Company v. Collins (Securities and Exchange Commission v. Collins), 436 U.S. 46, 97 S.Ct. 2229, 53 L.Ed.2d 100 (1977); and Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). Although not decided by this Court, Respondent submits that the case of First Multifund for Daily Income v. United States, 602 F.2d 332 (Ct.Cl. 1979) should also be considered at this point, as it is relied upon by Petitioner regarding the weight to be accorded to administrative regulations.

In all of the cases referred to in the preceding paragraph, except Piper v. Chris-Craft Industries, Inc., supra, each of the involved administrative agencies had been charged, vis-a-vis the applicable Acts, to administer and regulate certain industries, i.e., securities trading under the

Securities Act of 1933 (E.I. DuPont de Nemours v. Collins, supra; First Multifund for Daily Income v. United States, supra); Retail Fur Sales (Federal Trade Commission v. Mandel Brothers, supra); Interstate Trucking (United States of America v. American Trucking Associations, Inc., supra); and wholesale liquor sales in violation of antitrust laws and in restraint of interstate commerce (Black v. Magnolia Liquor Company, supra).

In First Multifund for Daily Income v. United States, supra, the SEC had consistently, over a period of 40 years, interpreted the Act to require a registration statement under the facts of that case. Plaintiff challenged the SEC's right to interpret the statute.

In upholding the SEC's right to determine whether a registration statement was necessary, the court, (referring to this Court's decision in Red Lion Broadcasting Company v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), as well as the DuPont case), held that:

> "In deciding this question, we are guided by the 'venerable principal that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong ....'
>
> * * * * *
>
> ... and a staff report as showing a 'consistent and long standing interpretation by the agency charged with administration of the [Investment Company] Act' which was 'entitled to considerable weight.'" At page 336.

Regarding the form in which the SEC had been interpreting the requirement for a registration statement, the Court of Appeals held that:

> "The form in which an agency manifests its interpretation of a statute it administers is immaterial; the critical thing is whether there is such an interpretation and how settled it has become." First Multifund for Daily Income v. United States, supra at p. 337.

The holding in First Multifund for Daily Income v. United States, is consistent with the above cited decisions of the Court, in which the Court followed a procedure of according great weight to administrative agency regulations and procedures which were promulgated by the individuals charged with the responsibility of administering the subject Acts, and upon a showing of settled, consistent agency interpretation of the subject Acts.

In this case, the Department of Health and Human Services, which has been charged with administering the subject Act, has not promulgated regulations. Moreover, there

is no history of consistent and long standing interpretation by the Department as to how the Act or subject section [42 U.S.C. § 300bb-2(2)(D)(i)] is to be interpreted.

Additionally, the presumed expertise of the Treasury Department in the field of taxation, "coverage deductions, and income inclusions" (Public Health Service Notice, supra at p. 604) is of limited value in determining Respondent's right to continuation health benefits from his governmental employer. Whether or not the Department of Treasury has special expertise in health matters, the regulations in question are only proposed, without benefit of the full scrutiny and debate preceeding adoption of final regulations.

A comparison of Petitioner's suggested application of the proposed Treasury

regulations, and Respondent's position, is akin to differentiating between this Court's treatment of E.I. DuPont de Nemours and Company v. Collins, supra and Piper v. Chris-Craft Industries, Inc., supra.

In Piper v. Chris-Craft Industries, Inc., supra, the Court declined to accord the SEC's position any weight in deciding whether a private cause of action should be implied by judicial interpretation in favor of a particular class of litigants. In determining to accord "limited value" to the SEC's position, this Court stated:

> "Even if the agency spoke with a consistent voice, however, its presumed "expertise" in the securities-law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely when a cause of action should be implied by judicial interpretation in favor of a particular class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the

> "administrative deference" rule .... [cites omitted].
>
> That rule [administrative deference rule] is more appropriately applicable in instances where, unlike here, an agency has rendered binding, consistent, official interpretations of its statute over a long period of time." Piper v. Chris-Craft Industries, supra, at fn. 27, 430 U.S. 41.

In E.I. DuPont de Nemours and Company v. Collins, supra, the Court accorded the SEC's position great weight because:

> "Given the wide variety of possible transactions between an investment company and its affiliates, Congress, quite understandably, made no attempt to define this standard with any greater precision. Instead, it followed the practice frequently employed in other administrative schemes. The language of the statute was cast in broad terms and designed to encompass all situations falling within the scope of the statute; an agency with great experience was given the task of applying those criteria to particular business situations in a manner consistent with the legislative intent." 432 U.S. 54-55.

In distinguishing Piper v. Chris-Craft Industries, Inc., supra, the Court noted:

> "This situation is quite different from that which confronted the Court earlier this Term in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 51 L.Ed.2d. 124, 97 S.Ct. 926 (1977). There, the Court held that the "narrow legal issue" of implying a private right of action under securities laws was 'one peculiarly reserved for judicial resolution' and that the experience of the Commission on such a question was of 'limited value.'" 432 U.S. 55, fn. 13.

Much like this Court in the Piper case, the Tenth Circuit was faced with interpreting the Act (PHS Act, with COBRA additions at §§ 300bb-1, et seq) to determine whether Respondent was entitled to continuation health benefits. In so doing, the Tenth Circuit apparently found the proposed Treasury Department regulation to be of "limited value" in determining that issue.

Considering that the Treasury Department has not adopted any regulations on the issue of entitlement to continuation health benefits, and "... has [not] rendered binding, consistent, official interpretations of its statute over a long period of time" (Piper v. Chris-Craft Industries, supra), the Tenth Circuit acted well within its discretion in determining that it was unpersuaded by the proposed Treasury regulations.

II. PETITIONER'S ISSUE "A"

A. Public Interest; Ripeness

In determining whether this is an "important reason", Respondent notes that the individual interest of a party to this action is an insufficient reason for granting review. (See e.g., Rice v. Souix City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955));

rather, the case needs to involve the settlement of issues of importance to the public. See, e.g., NLRB v. Pittsburg S.S. Co., 340 U.S. 498, 71 S.Ct. 453 95 L.Ed. 479 (1951).

Regarding the potential impact of this decision upon public and/or private employers, the only apparent impact would be the consideration by various underwriting departments, of insurance carriers providing group health plans to state and local governments, as to whether premiums for continuation coverage might be affected. The Court is, however, without the benefit of any underwriting studies and analyses on the effect (if any) of the Tenth Circuit's decision, and without the benefit of some history as to how this decision has been applied (if at all) by the lower courts. Consequently, there is no way to gauge the public interest in this case at this time.

B. Petitioner is Merely Seeking Recourse for Payments Made to Respondent.

In the aftermath of the Tenth Circuit's decision, Petitioner has paid $35,000.00 on account of Respondent's care at Bear Creek. In its Settlement Agreement with Respondent, Petitioner reserved its right to petition this Court for review. Petitioner's true interest appears to be in recovering this payment, which is an insufficient reason for granting review. Rice v. Souix City Memorial Park Cemetery, Inc., supra.

C. The Tenth Circuit Court of Appeals' Decision Regarding Respondent's Entitlement to Continuation Benefits Was Correct.

As noted above, the Tenth Circuit was faced with the task of interpreting the PHS Act, as amended by COBRA. As this Court has sagely observed in the past,:

> "Reliance on legislative history in divining the intent of

> Congress is, as has often been observed, a step to be taken cautiously. [cite omitted] .... As Mr. Justice Frankfurter reminded us: 'We must be wary against interpolating our notions of policy in the interstices of legislative provisions.'" Piper v. Chris Craft Industries, Inc., at 430 U.S. 27.

After carefully reviewing the legislative history, and the arguments provided by Petitioner and Respondent, the Tenth Circuit, at p. 1133 of its decision (890 F.2d 1128), held that:

> "Thus, while the contemporaneous legislative history does not specifically address the language at issue here, "covered (as an employee or otherwise)," we are satisfied that the overall statutory scheme contemplates continuation coverage to remain available to the covered employee despite a spouse's preexisting insurance policy. Surely the facts of this case illustrate the precise gap in coverage which troubled Congress. Mr. Oakley was terminated because of a catastrophic event which otherwise would have put his family at risk and jeopardized his treatment had continuation rules not been in effect to

> maintain his rehabilitation for a limited period of time.
>
> In light of Congress' overriding intent to address the crisis in health insurance coverage in the work place, we are persuaded that § 300bb-2(2)(D)(i) does not provide the basis to terminate continuation coverage under the circumstances of this case." (emphasis added).

Indeed, as correctly stated by the Tenth Circuit in its opinion, at pp. 1132-1133,:

> "The subsection must be construed, moreover, in light of the entire legislative scheme in which this component operates. See 2A C. Sands, Southerland on Statutory Construction § 46.05, at 90 (4th Ed. 1984)."

It is uncontroverted that Respondent was a qualified beneficiary under Petitioner's group health plan. It is also uncontroverted that Respondent experienced a qualifying event, as defined in § 300bb-3(2). Although Petitioner's statement of the facts erroneously states that Respondent

did not elect continuation health benefits, the Tenth Circuit correctly found that Respondent had elected continuation coverage, within the time period prescribed in § 300bb-5. Oakley v. City of Longmont, supra, at p. 1130, fn. 1.

Thus, the argument, on its merits, encompasses consideration of the entire legislative scheme of 42 U.S.C. § 300bb-1, et seq., and ultimately devolves down to the interpretation and operation of § 300bb-2(2)(D)(i), which provides that continuation coverage may terminate on:

> "The date on which the qualified beneficiary first becomes, after the date of the election --
>
> > (i) Covered under any other group health plan (as an employee or otherwise), ..."

The Tenth Circuit, when it addressed this issue, at p. 1132 of its opinion (890 F.2d 1128), held that:

> "When we read the underlined introductory language in conjunction with 'covered under any other group health plan (as an employee or otherwise),' we believe the plain meaning of this subsection cannot be construed to include a spouse's preexisting group plan as a condition to terminate continuation coverage. Indeed, Mr. Oakley did not 'first become' covered under his wife's policy after the qualifying event that resulted in his termination from the City's employment. Nor did Congress intend a covered employee's termination to become a condition triggering 'other' coverage under a spouse's preexisting group plan. Consequently, only when we read the language of subsection (i) to refer to other coverage occurring after the qualifying event, do we preserve its plain meaning and give effect to Congress' intent."

As has been consistently argued by Respondent, it is clear that the terminating event must occur at a point in time

subsequent to the election of continuation health benefits.

Petitioner insists that this clear temporal distinction must not be made because: (1) It violates Petitioner's perceived congressional intent to provide limited benefits; and (2) may, under tortured conditions, lead to absurd results.

No where in the PHS Act does Congress express an intent to provide limited benefits. Rather, when the Act is read as a whole, it clearly appears (as it did to the Tenth Circuit) that Congress meant to establish a comprehensive scheme of coverage providing meaningful benefits to qualified beneficiaries.

Realistically, an employee is not "covered" at all when a spouse's pre-existing insurance policy does not provide insurance coverage for the type of treatment

an employee is receiving as of the date of termination of employment as was the case here.

The fact is, notwithstanding the Treasury Department's proposed regulations, the Public Health Service Act, and its application to governmental employers, provides that continuation coverage must be "identical to the coverage provided under the plan to similarly situated beneficiaries under the plan with respect to whom a qualifying event has not occurred." § 300bb-2(1).

As correctly held by the Tenth Circuit, the foregoing provision for identical coverage, when read in conjunction with Congress' extension in coverage to include the covered employee as a qualified beneficiary, leads to the inescapable conclusion that Congress intended to provide

meaningful benefits and coverage to all qualified beneficiaries, including Respondent.

With regard to Petitioner's argument on "absurd results", it is clear that the result reached in this case is not absurd. As previously referenced, the Tenth Circuit correctly found that Respondent would have no insurance coverage to pay for his required treatment but for the continuation health benefits available through Petitioner's group health plan.

Rather, it is Petitioner which has reached for the absurd in creating fictional scenarios in which it argues that one might obtain continuation benefits, although "otherwise covered" by other policies which became effective after the qualifying event. When considering Petitioner's argument at pp. 36-37 of its Petition, it is absurd to

consider one electing to pay premiums for continuation health insurance coverage from his/her first employer "even if the second employer's plan duplicates the coverage of the first". What rational person would pay for two identical, overlapping insurance policies, or otherwise pay for a second identical, overlapping policy when one is already being provided at no expense to the employee?

Respondent submits that there are no real or legitimate circumstances under which the Tenth Circuit's decision could lead to absurd results. The real absurdity is that if Petitioner's reasoning were to be adopted by the Court, James Oakley would wind up without the continuation health benefits needed to treat his permanent, disabling brain injury.

CONCLUSION

In conclusion, Petitioner has not presented this Court with important reasons, affecting the public interest, or important questions of federal law, so to warrant review of the Tenth Circuit Court of Appeals' decision to confirm to Respondent his right to elect continuation health benefits.

Moreover, the decision of the Tenth Circuit not to mechanically apply the rationale of a proposed Treasury regulation is legally sound, as was the court's resulting interpretation of the coverage provided to Respondent under 42 U.S.C. § 300bb-1, et seq.

Consequently, the City of Longmont's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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